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SUBJECT: Procurement Issues

Recordkeeping Requirements

SFA Responsibility to Develop Specifications

Buy American

Questions and Answers

Food Service Management, Emergency Purchases, Buy American

NSLP – 101

TO: Authorized Representatives

FROM: Child and Adult Nutrition Services

This information should be shared with the people responsible for procurement for the school nutrition programs and the original should be placed in the numbered memo notebook from Child and Adult Nutrition Services. The memo is also available on the Child & Adult Nutrition Services website. Contact a Child and Adult Nutrition Services staff member if there are questions about this memo.

Record-Keeping Requirements

Some State Agencies (SAs) and School Food Authorities (SFAs) are failing to maintain appropriate records for procurement transactions occurring in connection with the Child Nutrition Programs. Departmental regulations at 7 CFR Parts 3016 and 3019, Program regulations at 7 CFR 210.9(b)(17), and the terms of the contract between SAs and each SFA, require both SAs and SFAs to retain their program-related records for a period of 3 years from the day the SA's or SFA's final allowable payment under the contract has been recorded. This is true regardless of whether the final payment is recorded prior to the expiration of the contract or subsequent to the expiration date.

When a procurement contract is continued or renewed at annual or other intervals, the retention period for the records of each contract period starts on the day the final payment is recorded in connection with the final renewal. It appears that many SAs and SFAs incorrectly believe that the 3-year record retention begins with the initial contract execution. The 3-year record retention period does not begin until the final contract renewal period has expired and/or the final payment is recorded, whichever occurs first.

Actions such as bid protests, litigation, and audits may result in an extension of this 3-year record retention period. In all such cases, the records must be retained until: (1) the completion of the action and resolution of all issues arising from it; or (2) the expiration of the regular 3-year period, whichever occurs later.

Adequate procurement methods are a prerequisite for receiving funds. If records generated during the performance of the award do not demonstrate compliance with applicable procurement requirements, several possible penalties may follow: disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other appropriate remedies. Examples of such records include:

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- A written rationale for the method of procurement;
- A copy of the request for proposal or the invitation for bid;
- The selection of contract type (fixed price or cost reimbursable);
- The bidding and negotiation history;
- The basis for contractor selection;
- Approval from the State agency to support a lack of competition when competitive bids or offers are not obtained;
- The basis for award cost or price;
- The terms and conditions of the contract;
- Any changes to the contract and negotiation history;
- Billing and payment records;
- A history of any contractor claims; and
- A history of any contractor breaches.

SFA Responsibility to Develop Specifications

US Department of Agriculture regulations [7 CFR Part 3016.36(b)] prohibit the awarding of contracts to any entity that develops or drafts specifications, requirements, statements of work, invitations for bids, requests for proposals, contract terms and conditions or other procurement documents. This guidance was issued upon our learning that a number of School Food Authorities (SFAs) were not drafting their own specifications and procurement documents for certain software acquisitions but instead directly incorporating a list of features written by a prospective bidder. Food and Nutrition Service (FNS) continues to receive complaints of SFAs using a prospective bidder to draft specifications and procurement documents and feel that this potential continued noncompliance with Departmental regulations warrants our addressing the issue directly with SAs.

An SFA has violated Department regulation 7 CFR Part 3016.60(b) when it fails to fulfill its responsibilities to draft its own specifications and procurement documents by copying a list of features or evaluation and ranking criteria drafted by a potential vendor and then permits that potential vendor to submit a bid. While schools have broad discretion in gathering information for use in connection with procurements, information from potential bidders must be appropriately modified to develop tailored specifications; otherwise these bidders must be excluded from competing for such procurements. This is to ensure objective contractor performance and eliminate unfair competitive advantage. A person that develops or drafts specifications, requirements, statements of work, invitations for bid, requests for proposals, contract terms and conditions or documents specifically for use by an SFA in conducting procurement under the Child Nutrition Division Programs shall be excluded from competing for such procurements.

Any action which diminishes open and free competition seriously undermines the integrity of the procurement process and may subject the SFA to bid protests. Therefore, please remind your respective SFAs that they must have protest procedures in place and disclose information regarding a protest to the SA. We are concerned that SFAs may not be properly responding to protests and concerns raised by potential contractors. Pursuant to 7 CFR Part 3016.36(b) (12), SFAs must have protest procedures in place to handle and resolve disputes relating to their procurements and must in all instances disclose information regarding a protest to their State agency.

BUY AMERICAN

This guidance serves as a general reminder about the importance of complying with the Buy American provisions that are found in the regulations of the National School Lunch Program (NSLP) at 7 CFR 210.21(d) and the School Breakfast Program (SBP) at 7 CFR 220.16(d).

Even though food products may be sold by reputable companies, the SFA personnel must remain vigilant as to the origin and processing locations. An item displayed at a recent national was clearly marked as containing a main ingredient from China and prepared in Thailand. Although the food item was not displayed as a component of any of the menu planning options in the NSLP or the SBP, it would be easy to mistakenly conclude that such products are acceptable for a la carte sales.

SFAs must ensure that all procurements using funds from the nonprofit school food service account comply with the Buy American provisions to the maximum extent practicable. This includes foods that are sold to students as a la carte food items. The questions and answers 10 – 18 below address more Buy American issues.

QUESTIONS AND ANSWERS ON VARIOUS TOPICS

1) We see guaranteed returns in contracts between school food authorities (SFAs) and food service management companies (FSMCs) and would like to know what they are.

Answer: When dealing with procurement contracts involving the National School Lunch and Breakfast Programs there are two basic variations of guaranteed returns. One involves the FSMC guaranteeing a return to the nonprofit school food service account at the end of the school year if certain agreed upon conditions in the contract are met. For example, if conditions x, y, and z are met the FSMC agrees at the end of the year to increase the nonprofit school food service account by an amount specified in the contract. A second type involves an agreement between the FSMC and the SFA that if the predetermined return amount is not met at the end of the school year, the FSMC will cover the amount by reducing its management fee, up to the amount of the fee. As with all terms and conditions, the guaranteed return provision must be specified in both the solicitation and contract documents.

2) What if the management fee doesn't cover the predetermined return amount? This is a possibility if at the end of the school year the loss exceeds the agreed upon predetermined return amount.

Answer: This is a potential problem which is why the SFA should review the guaranteed return provision carefully. If the guaranteed return provision requires the FSMC to provide a guarantee that they will repay an amount up to the agreed upon management fee, but not to exceed the fee if the terms and conditions of the agreement are not met, then the SFA is essentially agreeing to limit the contractor's liability. SFAs should consider that any agreement to limit the contractor's liability places the nonprofit school food service account at great risk should a substantial to catastrophic loss be experienced that school year.

3) If the SFA enters into a contract containing such a guaranteed return, does this mean they do not have to pay the FSMC for any losses incurred in the prior year?

Answer: No. It simply means they cannot pay for them out of the nonprofit school food service account. If the SFA entered into a contract that included a guaranteed return provision requiring that any losses incurred by the contractor in one year would have to be paid by the SFA in the subsequent year, then the SFA would have to pay with funds other than the nonprofit school food service account funds.

4) When can an SFA pay bonuses?

Answer: Generally, bonuses paid to employees are allowable costs and nonprofit school food service account funds may be used to pay the costs of bonuses for efficient performance or as a result of a suggestion or safety improvement. However, the bonuses can be paid to employees only as long as the overall compensation is determined to be reasonable and such costs are paid or accrued pursuant to a formally established labor agreement. Thus, this generally requires that such payments be a standard personnel practice.

5) A contractor is telling an SFA that they have to cover the costs of bonuses the contractor pays to its own employees. Can the SFA pay the bonuses for these employees?

Answer: Generally, no. Bonuses go to the SFA employees and not to their contractors. Neither the contractor nor its employees are employees of the SFA. One exception might entail an SFA paying for such bonuses if in its bid documents the SFA had explicitly included as a cost an FSMC's total compensation package for its employees that included bonuses (i.e., total compensation includes rate plus incentives). SFAs should be aware that if language does not exist in the Request for Proposal and in subsequent contracts to allow for such costs to be paid, then the SFA does not have to cover these costs. SFAs should be aware that the payment of such costs should be consistent with standard personnel practices. Also, such a provision should be considered very carefully as the incentive for a contractor to

perform well should be inherent in the awarding of the contract and not based on bonuses at the end of the contract period.

6) In light of the disaster stemming from Hurricanes Katrina and Rita, what would USDA consider an appropriate length of time available to conduct an emergency procurement?

Answer: During a disaster situation noncompetitive contracts may be awarded only when a public exigency or emergency exists that will not permit a delay in contracting that would result from a competitive solicitation. Our recommendation is that the SFA research its State's requirements on what constitutes an emergency situation and whether the provision discusses timeframes. Clearly these would qualify as emergency situations but not all disasters are clear. The State has to make the determination as to whether the emergency condition exists in the entire State or certain locales. The SFA must also check with the State to determine the length of the emergency situation so that any noncompetitive contracts comply with the timeframes associated with the designated emergency situation.

7) If a State has a provision in place that allows an SFA to use a noncompetitive contract due to an emergency situation such as the situations created by the hurricanes, does the SFA need FNS approval as well?

Answer: No. As noted above, as long as an SFA has received approval from its respective State regarding emergency designation they do not need FNS approval.

8) An SFA would like to purchase milk in plastic packaging (commonly called chugs) instead of the traditional paperboard cartons. If, however, the SFA is unaware whether it can afford the higher cost of the plastic packaging how can it award the contract to a supplier of the milk in plastic packaging when the supplier of the paperboard carton submitted a cheaper bid price?

Answer: As long as the SFA is not prohibited by State and local procurement requirements from using options within its bid documents, then it can conduct a solicitation that will allow for pricing on each type of carton individually. To accomplish this, the SFA's bid document should: 1) include the specifications for each type of product (i.e., plastic packaging versus traditional paperboard cartons); 2) provide explicit information about how bids for each option will be evaluated to determine responsiveness and pricing and the basis for contract award; 3) make clear that in the evaluation of the bids, responsiveness and pricing will be compared only within each option (i.e., the bids submitted for plastic packaging are only compared to each other); or across all of the options (i.e., price of plastic packaging compared to paperboard packaging); and 4) ensure that the award criteria is drafted to permit the SFA to award the bid to the lowest priced responsible responsive bidder for either of the options. Also, to maximize competition, potential bidders should be encouraged to submit bids for all of the options offered.

9) How can SFAs participating in Cooperative Buying Groups (CBGs) provide more than one supplier on the purchasing list so that they are not limited in terms of the items they can purchase?

Answer: By pooling their purchasing power to acquire goods and services, SFAs hope to lower their operating costs, better respond to competition, and improve overall performance. Often, however, CBGs believe that their ability to purchase in large quantities, due to their pooling of purchasing power, limits them to negotiating a volume purchase with only one food vendor to achieve the best price. This does not have to be the case. A CBG can identify in its solicitation document that it will seek multiple suppliers. The CBG would test the products of the responding vendors using an evaluation system that assesses and scores the products based on taste, price, quality, and quantity. The CBG would set a percentage and those vendors whose products score at or beyond the set percentage would pre-qualify. The CBG would then ask for best and final prices of those that have pre-qualified and allow the SFAs participating in the CBG to purchase from the top ranked of the vendors who provided the lowest price.

10) What are the requirements of the Richard B. Russell National School Lunch Act's (NSLA) Buy American provision that School Food Authorities (SFAs) must follow when purchasing food and food products for use in the Child Nutrition Programs?

Answer: Section 104(d) of the William F. Goodling Child Nutrition Reauthorization Act of 1998 (Public Law 105-336) added a new provision, Section 12(n) of the NSLA [42 USC 1760(n)], requiring SFAs to

purchase domestically grown and processed foods, to the maximum extent practicable. Purchases made in accordance with the Buy American provision must still follow the applicable procurement rules calling for free and open competition.

11) How would a SFA determine if it is a “domestic commodity or product”?

Answer: Section 12(n) of the NSLA defines “domestic commodity or product” as one that is produced and processed in the United States substantially using agricultural commodities that are produced in the United States. One of the reports accompanying the legislation noted that “substantially” means that over 51% of the final processed product consists of agricultural commodities that were grown domestically.

12) Are there any exceptions to the requirements of the Buy American provision?

Answer: Yes. While rare, two situations which may warrant a waiver to permit purchases of foreign food products include: 1) the product is not produced or manufactured in the U.S. in sufficient and reasonable available quantities of a satisfactory quality; and 2) competitive bids reveal the costs of a U.S. product is significantly higher than the foreign product.

13) Does the “Buy American” provision apply to entities that purchase on behalf of an SFA, such as a purchasing cooperative or a food service management company?

Answer: Yes. Any entity that purchases food or food products on behalf of the SFA must follow the same “Buy American” provisions that the SFA is required to follow.

14) Does the “Buy American” provision apply only to purchases made using Federal funds under the Child Nutrition Programs?

Answer: No. SFAs must ensure that all procurements using funds from the nonprofit school food service account comply with the Buy American provision. Pursuant to Child Nutrition Program regulations, all Federal funds, all money received from children as payment for program meals, all proceeds from the sale of competitive foods, and all other income generated by the school food service must inure to the food service account. As a consequence, the entire nonprofit school food service account becomes subject to Federal procurement standards.

15) What can an SFA do to comply with the requirements of the Buy American provision?

Answer: There are a number of ways SFAs can comply with the provision. SFAs should be including a Buy American clause in all product specifications, bid solicitations, requests for proposals (RFPS), purchase orders, and other procurement documents issued.

Additionally, SFAs are required by 7 CFR 3016.36(b) (2) to monitor contractor performance to ensure compliance with all contractual requirements, including the Buy American provision. SFAs can also ask their suppliers to provide certification as to the origin of the product which is discussed in more detail in question #9.

16) How should an SFA determine the country of origin for an end product?

Answer: For manufactured end products, there is a two-part test to define end product: (1) the article must be manufactured in the United States; and (2) the cost of domestic components must exceed 50 percent of the cost of all the components. It is not enough to assume that a product with a well recognized American brand name or product supplied by a domestic foodservice distributor complies with the Buy American provision. SFAs should inquire further with their suppliers to determine the country of origin for an end product because some products sold in school meals may carry the name brand of domestic company but the product itself may derive from another country. SFAs should also examine product packaging as the Nutrition Labeling and Education Act of 1990 mandates that the country of origin for both domestic and imported food products be identified on the product labels.

17) Should SFAs rely on the distributors' reliance on information from American suppliers about the amount of domestic content in the parts, components, and other elements they buy and use for their final products?

Answer: According to the Federal Trade Commission, if given in good faith, entities can rely on information from foodservice distributors about the domestic content in the parts, components, and other elements contained in the product. However, rather than assume that the input is 100 percent U.S.-made, SFAs would be wise to ask the supplier, i.e., manufacturer or distributor, for specific information about the percentage of U.S. content. SFAs can include in their bidding process a requirement for certification along the lines of: "We require that suppliers certify the percentage of U.S. content in products supplied to us. If you are unable or unwilling to make such certification, we will not purchase from you." Appearing under this statement could be the sentence, "We certify that our ____ have at least ____% U.S. content," with space for the supplier to fill in the name of the product and its percentage of U.S. content.

18) Doesn't this place some of the burden on the manufacturers and distributors of food and food products in the Child Nutrition Programs?

Answer: Yes. The ability to certify, as required by the terms of the contract with the SFA, will require that manufacturers and processors look back far enough in the manufacturing process to be reasonably sure that any significant foreign content has been identified.